J. Thomas Cairns, Jr., SBN 75991
J.T. CAIRNS & ASSOCIATES
200 North Larchmont Blvd.
Los Angeles, California 90004
(323) 743-8470
jtcairns@ca.rr.com

Attorneys for Respondent

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY LOS ANGELES

ADRIAN RISKIN, Petitioner, vs. LARCHMONT VILLAGE PROPERTY OWNERS ASSOCIATION, Respondent.	**CASE NO.: BS172934** *[Assigned to Hon. Mary H. Strobel – Dept. 82]* **RESPONDENT'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PETITIONER RISKIN'S MOTION FOR ATTORNEYS' FEES** **Date: November 21, 2019** **Time: 1:30 p.m.** **Dept.: 82** Date Filed: March 20, 2018 Trial Date: May 16, 2019

INTRODUCTION

By this litigation Petitioner Adrian Riskin seeks to enlist this Court's aid in furthering his avowed campaign to "destroy" Business Improvement Districts through abuse of the California Public Records Act. The instant fee motion, in particular, is intended as the coup de gras for the Larchmont Business Improvement District. Having failed, so far, to claim at least one BID scalp through repetitive, redundant, vague and burdensome requests for records concerning matters which can only be characterized as trivial, he now seeks to bankrupt it instead.

Mr. Riskin should not be allowed to turn the CPRA on its head and use it as a weapon to further his own political objectives. The attorneys' fee provisions of the CPRA are intended for public benefit and are not for private use to cause public detriment. Fortunately, well established rules of equity preclude such abuse. Among other things, Riskin's failure to pursue *any* prelitigation efforts to resolve this matter and choosing instead to file a stealth writ petition backed up by an exorbitant and extortionate fee demand demonstrate that the current litigation was entirely unnecessary. As a matter of law, there can be no such thing as "reasonable" attorneys' fees for pursuing unnecessary litigation.

For this and many other reasons, Riskin's fee motion should be denied in its entirety or, at least, substantially reduced.

STATEMENT OF PERTINENT FACTS

The facts pertinent to this motion are set forth in the Declaration of J. Thomas Cairns, Jr. and Exhibits thereto that are filed and served herewith ("JTC Dec."); in the Declarations of Thomas Kneafsey, Rebecca Hutchinson and Heather Boylston filed on October 14, 2019 in opposition to Petitioner's Ex Parte Application for an Order to Show Cause re: Contempt and incorporated herein by this reference; and in the declarations and exhibits filed in support of the motion.

The Parties

The Larchmont BID

Respondent, the Larchmont Village Property Owners Association acts as the managing entity for the Larchmont Village Business Improvement District (the "BID"), which includes a total of 25 commercially zoned parcels along both sides of a two block stretch of Larchmont Boulevard in Los Angeles. The BID operates on an annual budget of approximately $140,000 for the purpose of providing services that the City of Los Angeles is unable or unwilling to provide including sidewalk cleaning, tree pruning, trash collection and trash bin cleaning. The BID – perhaps the smallest in Los Angeles - has never had any full or part time employees, administrative staff or information technology department and has no budget for such staff. (JTC Dec., ¶¶ 2-4; Exhibit 1)

Petitioner Adrian Riskin

Mr. Riskin is a well-known political activist and blogger who comments upon and advocates for issues affecting local government on his website, michaelkolhaas.org.[1] Mr. Riskin has a particular interest in Business Improvement Districts, characterizing BIDs on his website in colorful language as "criminal conspiracies" run by "white supremacists". He is, of course, free to express his opinions and a free society needs (but seldom appreciates) gadflies who will keep government honest. As will be shown herein, however, there is a line between a mere gadfly and one who employs extreme tactics to disrupt and impede the performance of important and legitimate public functions. Mr. Riskin has clearly crossed that line.

Riskin's Published Plan to "Destroy" Business Improvement Districts Through Use of the Public Records Act

Among the blog posts made by Mr. Riskin on his website (michaelkolhaas.org) is one dated June 24, 2016 titled "How To Destroy a Business Improvement District in California: A Theory", in which Mr. Riskin suggests use of the California Public Records Act ("CPRA") for that purpose. (JTC Dec. ¶ 24; **Exhibit 13**)

Mr. Riskin' interest in the CPRA has moved well beyond mere "theory" and he has made extensive use of the Act. In addition to the instant action and numerous other public records actions against various governmental entities, Mr. Riskin has brought no fewer than seven (7) other mandamus proceedings in this Court against Business Improvement Districts in the City of Los Angeles within the past three years. Those California Public Records Act mandamus actions include:

Adrian Riskin vs Hollywood Media District Property Owners (LASC # BS166075)

Adrian Riskin vs Hollywood Property Owners Alliance et al (LASC # BS166500)

Adrian Riskin vs Melrose Business Improvement Association (LASC # BS172760)

Adrian Riskin vs Westchester Business Improvement Association (LASC # BS172761)

Adrian Riskin vs Venice Beach Property Owners Association (LASC # BS173266)

[1] The website name michaelkohlhaas.org, comes from a fictional radical in German literature – based on a real German terrorist who was executed in 1540 after trying to burn down the city of Wittenburg.

Adrian Riskin vs Historic Core Business Improvement District (LASC # BS174718)
Katherine McNenny, Adrian Riskin, et al vs Los Angeles Chinatown Business Council (LASC # BS174784)

Riskin's CPRA Requests to the Larchmont BID

Beginning in October 2016, Mr. Riskin has made no fewer than nine (9) public records requests to the Larchmont BID. Those requests include emailed requests from Mr. Riskin dated October 17, 2016; October 25, 2016; February 2, 2017; April 16, 2017; April 17, 2017; May 2, 2017; June 4, 2019; October 14, 2019; and October 15, 2019. (JTC Dec. ¶ 5)

Those requests have required the BID's officers and employed professionals to spend considerable time (at least 80 hours) in searching their records and responding to them. (JTC Dec.¶6; Kneafsey Dec. ¶6; Boylston Dec ¶6; Hutchinson Dec. ¶6)

The BID's Cooperation with Riskin's Former Counsel in Fulfilling His Requests

In responding to Riskin's October, 2016 and February, 2017 requests, the BID's counsel developed a good working relationship with Riskin's former counsel, Colleen Flynn. They communicated frequently in clarifying ambiguities in Riskin's requests and in ensuring that responsive productions were complete. (JTC Dec. ¶¶ 7-11; Ex. 2 - 5)

By April 5, 2017, Mr. Cairns and Ms. Flynn had narrowed the issues on those 3 requests down to just a few remaining documents, which Ms. Flynn outlined in a letter of that date. (JTC Dec. ¶ 8; Ex. 2) Mr. Cairns responded to that letter by producing all remaining documents under cover of his letter dated April 16, 2017 stating: "I believe that we have now provided copies of all minutes and other documents that are responsive to your client's requests and that can be located through a reasonable search of our records, Please let me know if I can be of further assistance." (JTC Dec. ¶ 9; Ex. 3) Three days later, on April 19, 2017, Ms. Flynn acknowledged receipt of the remaining documents, saying "Thank You Mr. Cairns". (JTC Dec. ¶ 10; Ex. 4)

Riskin Takes a 10 Month Hiatus

Following Ms. Flynn's April 19, 2017 acknowledgment of receipt of all the records sought by Mr. Riskin's first 3 CPRA requests, the BID heard nothing further from her, from Mr. Riskin, or from anybody else acting on his behalf for nearly 10 months. (JTC Dec. ¶12). On February 17,

2018, the BID received an email from Mr. Riskin claiming that "last year" he had sent CPRA requests that had not been responded to. Riskin's email neither attached the requests nor identified their subject matter. (JTC Dec. ¶ 13; Ex. 6)

On March 6, 2018, Mr. Cairns responded to Riskin's email informing him that he had previously responded to his multiple requests through Ms. Flynn. Mr. Cairns further informed Mr. Riskin that he had left his former law firm in October, 2017 and offered to search the email archives of that firm to locate the responsive records that had been provided to Ms. Flynn. (JTC Dec. ¶ 14; Ex. 7) Mr. Riskin did not respond to that offer but continued to assert that there were outstanding requests. (JTC Dec. ¶¶ 14 – 15; Ex. 7 – 8)

Mr. Cairns continued to believe, based on his dealings with Ms. Flynn 10 months earlier and the absence of any contact at all from Riskin during that lengthy hiatus, that the BID had fully resolved all issues and produced all records responsive to Riskin's multiple requests. It was not until months later, in September 2018, when a letter from Mr. Cisneros led him to realize that Mr. Riskin had sent – or purported to send - additional CPRA requests during the 3-day period between his April 16, 2018 production of all remaining records to Ms. Flynn and her April 19, 2018 acknowledgment of receipt of those records. (JTC Dec. ¶¶ 19 – 21; Ex. 11 – 12)

The BID Gets Sandbagged By This Lawsuit and an

Extortionate Demand for Attorneys' Fees

Unbeknownst to the BID or its counsel, Mr. Riskin had already retained attorney Abenicio Cisneros to file the instant lawsuit. (See: billing records attached as Exhibit "D" to the Declaration of Abenicio Cisneros filed in support of the instant motion). The first the BID learned of this was on April 2, 2018 when it received a lengthy letter from Mr. Cisneros attaching a copy of the already filed writ petition and making demand for payment of $17,000 in attorneys' fees. (JTC Dec. ¶ 16; Ex. 9)

Notwithstanding Riskin's 10 month hiatus, neither the BID nor its counsel had received so much as a phone call or email from Mr. Cisneros to introduce himself – let alone any clarification of what Mr. Riskin had been referring to in his recent emails or any effort to resolve any issues about documents through further production or settlement.

Notably, Mr. Cisneros' introductory letter asserted that any further production of documents by the BID would result in his client becoming the "prevailing party" with an entitlement to substantial attorneys' fees! (JTC Dec. ¶ 17; Ex. 9, at p.2) It must further be noted that, based on Mr. Cisneros' own billing records filed in support of the instant motion, his $17,000 demand of April 2 inflated his attorneys' fees by nearly 65%, at his claimed "adjusted rate" of $425/hour. (See: Ex. "D" to Cisneros Dec. at p. 2, items 17 – 18; Ex. 9 to JTC Dec.)

As Mr. Cairns states in his declaration, had Mr. Riskin or his counsel responded to his March 6, 2017 offer to search for emails on his former law firm's server or otherwise contacted him to discuss production of records prior to commencing this litigation, he would have worked with them, in good faith, as he had done with Ms. Flynn, in an effort to comply with the records requests. (JTC Dec. ¶ 22) He was never given the opportunity to do so and, instead, was given this entirely unnecessary lawsuit filed for the obvious purpose of extorting money from his client.

ARGUMENT

THIS LITIGATION WAS COMPLETELY UNNECESSARY, HAS BEEN BROUGHT IN BAD FAITH AND SMACKS OF A BLATANT "SETUP"

It is well settled law that, in order to recover statutory attorneys' fees in California, a plaintiff must have engaged in a reasonable attempt to settle its dispute with the defendant ***prior to litigation***. [*Graham v. DaimlerChrysler Corp* 34 Cal.4th 553, 559-561 (2004)] As the California Supreme Court explained in *Graham*:

> "Awarding attorney fees for litigation when those rights could have been vindicated by reasonable efforts short of litigation does not advance [the objective of private enforcement of public interests] and encourages lawsuits that are more opportunistic than authentically for the public good. Lengthy prelitigation negotiations are not required, nor is it necessary that the settlement demand be made by counsel, but a plaintiff must at least notify the defendant of its grievances and proposed remedies and give the defendant the opportunity to meet its demands within a reasonable time."
>
> [*Graham v. DaimlerChrysler, supra*, 34 Cal.4th 553, 577]

Here, after going on "radio silence" for many months prior to commencement of this litigation, Riskin and his counsel should have made at least *some* attempt to resolve any disputes over the records request prior to launching their stealth litigation attack accompanied by highly inflated demand for attorneys' fees. This is particularly true where the BID's counsel had offered, in writing, three weeks before this case was filed, to search the email server at his former law firm to find the communications and records that he thought, in good faith, had long since been provided to Ms. Flynn.

In light of Petitioner's utter failure to seek a pre-litigation resolution of any disputes, the assertion made by Mr. Cisneros in his moving papers that a large portion of his claimed fees were occasioned by Respondent's failure to settle "both before and after the litigation" rings hollow. Indeed, there is not even any showing that there were any "disputes" to be resolved. Despite repeated claims in Riskin's moving papers that the BID "refused" to settle the case, they have presented no evidence at all of any such "refusal". To the contrary, the evidence shows that BID and its counsel had worked with Ms. Flynn, in good faith and with complete success, in resolving all issues concerning Riskin's first three records requests. The overwhelming inference to be drawn is that the BID would have continued to do so – if only it had been given the chance before the suit was filed.

It is sometimes said that the existence of a private motive in pursuing public interest litigation is "irrelevant" to the issue of recovery of statutory fees. That rule is subject to a major exception, however, where the PRA is used for an "improper purpose" such as harassment or extortion. [*Bertoli v. City of Sebastopol*, 233 Cal.App.4th 353, 370 (Cal. Ct. App. 2015)] In this case, one need not speculate about Mr. Riskin's "improper purpose" in pursuing this litigation under the public records act. His purpose has been published to the whole world on his michaelkohlhaas blog – it is to "destroy" BIDs. (See Ex. 13)

As outlined in Riskin's blueprint for BID destruction, his strategy is to play a game of "gotcha" by issuing frequent, overlapping and confusing CPRA records requests in order to trap BIDs into technical violations of law and then bankrupt them through litigation – at least if they have not already been driven into bankruptcy by the burden of responding to the requests. (Ex. 13)

This case has never been about access to public records. Mr. Cisneros made that abundantly clear in his April 2 letter (Ex. 9), when he warned that production of any records after litigation was commenced would trigger a substantial liability for attorneys' fees. Rather, it is all about money – or, at least, about extracting money and resources from BIDs so that they will be unable to perform the public services that city governments throughout California are either unable or unwilling to perform.

There is no showing at all of any public benefit from this purportedly "public interest" litigation.

Indeed, substantial public detriment will result if Riskin's avowed campaign to "destroy" BIDs is allowed to succeed. Who, pray tell, will sweep the sidewalks, collect the trash and trim the trees in Larchmont Village if the BID is subjected to a fee award for a substantial portion of its total annual revenue?

This unnecessary and bad faith litigation has caused a tragic waste of judicial resources. Surely courts should not reward – let alone incentivize such a waste of everyone's time, when Mr. Cisneros could not even bother to make a phone call to introduce himself before filing this suit and issuing his grossly inflated $17,000 fee demand.

THIS COURT HAS BROAD DISCRETION IN DETERMINING AN APPROPRIATE AWARD OF ATTORNEYS' FEES THAT WILL AVOID AN UNJUST RESULT OR IN DENYING SUCH AN AWARD ALTOGETHER

Riskin's moving papers seem to take the position that an award of attorneys' fees should be automatic, to be determined by simple arithmetic application of the "lodestar" formula whenever the applicant is, technically, a "prevailing party". Controlling authority holds otherwise. Far from being an inflexible rule that would bind a court in a judicial straightjacket, the "lodestar" must be seen as only a starting point and a trial court has both broad discretion and the duty to apply equitable principals to avoid an unjust result. [*Graham v. DaimlerChrysler*, 34 Cal.4th 553 (2004); *Ketchum v. Moses* 24 Cal.4th 1122, 1137 (2001); *Bernardi v. County of Monterey* 167 Cal.App.4th 1379, 1393 (2008); *EnPalm v. Teitler*, 162 Cal.App.4th 770, 777 (2008); *Bertoli v. City of Sebastapol*, 233 Cal.App.4th 353, 377; (2015)]

The awarding of attorney fees and the calculation of attorney fee enhancements are highly fact-specific matters best left to the discretion of the trial court. [*Ketchum, supra*, at 1131-1132] This is particularly true in CPRA cases where "… the extent of the PRA's coverage 'is a matter to be developed by the courts on a case by case basis [citations omitted]. In fact, 'this decision-making process is an unavoidable consequence resulting from the myriad organizational arrangements adopted for 'getting the business of government done. … It follows, then, that 'each arrangement must be examined in its own context.'" [*Bertoli v. City of Sebastapol.* 233 Cal.App.4th 353, 377 (2015)]

The organizational arrangement of a very small BID which exists for the sole purpose of performing the myriad small tasks that the government is unwilling or unable to perform but which has no employees or administrative staff renders it particularly vulnerable to harassment by repeated broad fishing expeditions employed by Riskin's campaign to "destroy" it. Equity demands that this Court furnish it some protection.

In the fact-specific context of failure to pursue pre-litigation settlement opportunities, such as this case, the application of equitable principals to avoid a manifestly unjust result is required. The case of *EnPalm v. Teitler*, 162 Cal.App.4th 770, 777 (2008) is instructive on this point. There, the court upheld reduction of a "lodestar" figure of $50,000 by 90% - to $5,000 – where the court found that the litigation was unnecessary, reasoning that fees incurred in pursuing unnecessary litigation would not be "reasonable".

Litigation brought for the avowed purpose of "destroying" a BID through use of the CPRA, backed up by an exorbitant fee demand, also calls for a substantial reduction from the "lodestar" amount. In *Graham v. DaimlerChrysler, supra,* the court wrestled with the danger of incentivizing extortionate attorney fee demands through the allowance of attorneys' fee awards, quoting Justice Scalia's warning in *Buckhannon Board Care Home, Inc. v. West Virginia Dept. of Health and Human Resources* [(2001) 532 U.S. 198] that this could become "… a rule that causes the law to be the very instrument of wrong – exacting the payment of attorneys' fees to the extortionist." [*Buckhannon, supra,* 532 U.S. at 618] The *Graham* court saw the protection against this danger in the broad discretion of a trial court in connection with attorneys' fee awards, stating that:

> "Our starting point in this endeavor is the observation that the Legislature has assigned responsibility for awarding fees . . . "not to automatons unable to recognize extortionists, but to judges expected and instructed to exercise `discretion.'" (*Buckhannon, supra*, 532 U.S. at 640 (dis.opn. of Ginsburg, J.)) [*Graham v. DaimlerChrysler, supra*, 34 Cal.4th at 574]

Even if this litigation could be shown to have been necessary, despite the absence of any pre-litigation settlement discussions, it commenced with an exorbitant fee demand that was at least 65% greater than the actual fees incurred, as shown by Mr. Cisneros' own time records. This Court is certainly not an "automaton" and it ought to be able to recognize extortion when it sees it. Such grossly inflated demands were a severe impediment even to post-litigation settlement, especially in the fact-

specific context of this action, where the BID had no available resources to satisfy such demands and told Riskin's counsel that from the outset. As our California Supreme Court has held:

> A fee request that appears unreasonably inflated is a special circumstance permitting the trial court to ***reduce the award or deny one altogether***. "If . . . the Court were required to award a reasonable fee when an outrageously unreasonable one has been asked for, claimants would be encouraged to make unreasonable demands, knowing that the only unfavorable consequence of such misconduct would be reduction of their fee to what they should have asked in the first place. To discourage such greed, a severer reaction is needful. . . ." [Serrano v. Unruh, 32 Cal.3d 621, 635 (1982), *emphasis added*]

Many other portions of Riskin's fee request are manifestly unreasonable. Cisneros' request for fees of over $3,000 for 24 hours of driving time cannot be justified, where hourly flights are available between Los Angeles and the Bay Area for a pittance. Would Mr. Cisneros claim even more fees if he had decided to walk to Los Angeles?

Where Riskin's counsel had been told over and over that diligent searches had been performed and that there were no further records located, his pursuit of an Ex Parte Application for an OSC re Contempt to force the BID to prove precisely that was an exercise of pure vindictiveness or a further attempt to intimidate, harass and coerce a monetary settlement.

CONCLUSION

This Court must not reward Mr. Riskin for his abusive tactics – let alone incentivize him and others to continue to pursue them. The motion for fees should be denied in its entirety or, at least, be substantially reduced.

Respectfully submitted,

Dated: November 6, 2019

J. Thomas Cairns, Jr.
Attorney for Respondent

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 200 N. Larchmont Blvd., Los Angeles, CA 90004.

On November 6, 2019, I served true copies of the following document(s) described as **RESPONDENT'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PETITIONER RISKIN'S MOTION FOR ATTORNEYS' FEES** on the interested parties in this action as follows:

Abenicio Cisneros, Esq.
2443 Fillmore Street
San Francisco, CA 94115

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed above and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with my firm's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

BY EMAIL: I caused the document to be transmitted by electronic mail, addressed as follows:

acisneros@capublicrecordslaw.com

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 6, 2019, at Los Angeles, California.

J. Thomas Cairns, Jr.